

BUSINESS LAW SECTION

CORPORATIONS COMMITTEE

COMMITTEE MEETING MINUTES FOR DECEMBER 6, 2002

Friday, December 6, 2002
By Videoconference

A regular meeting of the Corporations Committee (the "Committee") of the Business Law Section of the State Bar of California was held by video conference on December 6, 2002. Attendance was as follows:

MEMBERS PRESENT:

Keith Paul Bishop
Curt C. Barwick
Bruce Dravis
James K. Dyer, Jr.
Teri Shugart Erickson
James F. Fotenos
Steven K. Hazen
Mark T. Hiraide
Victor Hsu

John H. Marlow
Keith B. Martin
Brian D. McAllister
David M. Pike
Randall Brent Schai
James R. Walther
Daniel J. Weiser
Neil J Wertlieb
Brian Wong

MEMBERS ABSENT:

John C. Carpenter
Nelson D. Crandall
Timothy J. Fitzpatrick
Stewart Laughlin McDowell
Ethna M. S. Piazza
Cynthia Ribas
Nancy Wojtas

LIAISONS PRESENT:

William Gay, Executive Committee
Suzanne S. Graeser, Executive Committee
Gayle Oshima, Department of Corporations
Rosalind Tyson, Securities and Exchange Commission

GUEST PRESENT:

Linda Leonard, Irell & Manella LLP

The minutes summarize discussions primarily in the order items were listed on the Agenda for the meeting previously circulated to members of the Committee, which is not necessarily the order in which the items were actually taken up at the meeting. The Committee did not take up those topics listed on the Agenda, which are not described in these minutes.

I. ADMINISTRATIVE MATTERS.

A. Opening Remarks and Announcements. The meeting was called to order by Co-Chair Keith Bishop at approximately 9:30 a.m. Mr. Bishop opened the meeting by asking those in attendance to introduce themselves.

B. Minutes of November 1, 2002 Meeting. A few comments were made concerning the draft minutes of the meeting of the Committee held on November 1, 2002. The minutes of the November 1, 2002 meeting previously circulated to the members, with minor revisions to address the comments made during this meeting, were approved by the Committee.

II. LIAISONS' REPORTS AND DISCUSSION.

A. Securities and Exchange Commission. Rosalind Tyson provided a brief overview of the current activities of the Securities and Exchange Commission ("SEC"). Ms. Tyson discussed the status of listing standards for self-regulatory organizations ("SROs") under Section 301 of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley Act") and corporate governance requirements. Ms. Tyson also discussed other actions being taken by the SEC in connection with the implementation of the Sarbanes-Oxley Act, including the recently proposed rules ("Proposed Rules") concerning the implementation of standards of professional conduct for attorneys practicing before the SEC. An extensive discussion of the Proposed Rules followed (as discussed in greater detail under Section VII(A) below).

B. Department of Corporations. Gayle Oshima reported that Tim Le Bas could not attend the meeting because he was meeting with an interagency task force at the same time to study the Sarbanes-Oxley Act and coordinate the state's efforts. Ms. Oshima informed the group that the Committee should receive comments this month from the California Department of Corporations ("Department") concerning the Committee's proposals relating to finance lenders and fax filings. Ms. Oshima reported that the Department is posting fairness hearing summaries and desist and refrain orders on its website

C. BLS Executive Committee. Suzanne Graeser delivered a status report from the Executive Committee. Ms. Graeser reported that the Executive Committee is very pleased with the Committee's website and is using it as an example for the other standing committees. Ms. Graeser suggested that the Committee consider sending the Committee's Sarbanes-Oxley comment letter to all persons on its constituency list. Ms. Graeser reminded the Committee that the Spring Meeting of the Business Law Section is scheduled for April 4-6, and encouraged everyone to attend.

D. Secretary of State. Keith Bishop reported that he had recently spoken with Cathy Mitchell, Chief, Business Programs, California Secretary of State. The Secretary of State's office is working diligently to implement AB 55. Ms. Mitchell had received the Committee's letter concerning AB 55 and thought it was helpful. The Committee expressed its desire to invite Secretary of State Shelley to the Committee's meeting in Sacramento during March.

E. Partnerships and LLC Committee. Steve Hazen provided a brief report on recent events concerning the Partnerships and LLC Committee. Mr. Hazen discussed (i) an issue relating to the death of the single member of a limited liability company, and (ii) the proposed adoption of the re-revised Uniform Limited Partnership Act formulated by the National Conference of Commissioners on Uniform State Laws ("NCCSL").

F. UCC Committee. Jim Fotenos reported that the UCC Committee has an ambitious agenda for the coming year. Mr. Fotenos stated that the UCC Committee is working on legislative proposals to revise Articles 1, 3 and 4 of the UCC in California to implement changes developed by NCCSL. Mr. Fotenos also reported that the UCC Committee is in the process of updating its opinions report on personal property secured transactions to reflect changes made to Articles 8 and 9 and opinion practice since the report was issued in 1989.

III. PENDING LEGISLATION/AFFIRMATIVE LEGISLATIVE PROPOSALS.

A. Report by Legislative Liaison. Jim Fotenos reported on the current status of pending legislation. Mr. Fotenos noted that SB 1 (Speier), involving financial privacy, was introduced in the Senate on December 2, 2002. No other bills of interest to the Committee had been introduced for this session. The deadline for the identification of legislative proposals by the Committee is next month.

B. Secretary of State Fax Filings. Bruce Dravis reported that he received an email from Terry Miller, Principal Legislative Consultant, State Bar of California, stating that Senator Romero is

very interested in carrying the Committee's legislative proposal concerning fax filings. In addition, Assembly member Chavez has expressed an interest in carrying this legislative proposal in the Assembly.

IV. POTENTIAL AFFIRMATIVE LEGISLATIVE PROPOSALS

A. AB 55 Cleanup and Corrections. Keith Bishop has discussed this matter with Cathy Mitchell, Chief, Business Programs, California Secretary of State. Mr. Bishop's report is discussed under II(D) above, Secretary of State.

B. Corporate Cleanup. Keith Bishop provided an overview of the legislative proposal to amend Sections 600, 903, 2205 and 2114 of the California Corporations Code, which was included in the meeting materials distributed to the members of the Committee in advance of the meeting. In addition, Brian McAllister informed the Committee that a cross reference in Section 1301(b) to Section 1300(b)(1)(i) and (ii) should actually be to 1300(b)(1)(A) and (B). The Committee unanimously approved the proposal as distributed in the meeting materials with the addition of revisions to Section 1301(b) to address the issue raised by Mr. McAllister.

C. 25118(b) Definition of Aggregate Evidences of Indebtedness. Dan Weiser provided an overview of a legislative proposal to amend Sections 25117 and 25118 of the California Corporations Code to expand and clarify exemptions from the usury prohibition, which had been distributed to the members in advance of the meeting. The proposed revisions to Section 25117 would exempt from usury laws transactions in which a business entity is the borrower, and the proposed revisions to Section 25118 would clarify that prior advances would be included for purposes of calculating the \$300,000 usury exemption threshold embodied in Section 25118(b). Mr. Weiser noted that Tim Le Bas had provided comments to the legislative proposal in advance of the meeting by email. After discussion of the proposal, the general consensus of the Committee was that the proposed revisions to Section 25117 would not be well received by the Legislature at this time and, therefore, should be deleted from the proposal. The proposal to amend Section 25118(b) was unanimously approved by the Committee.

D. Electronic Communications. Brian McAllister reported that the electronic communications working group planned to distribute a legislative proposal for discussion at the next meeting of the Committee.

V. WEBSITE PROJECTS

VI. OTHER PROJECTS

A. Educational Activities. David Pike reported that the Committee would be sponsoring two programs at the upcoming Winter Education Institute of the Business Law Section. One program will be on Nevada corporations and the other program will be on covenants not to compete under California law. Mr. Pike noted that the Committee's program relating to the Sarbanes-Oxley Act was considered too advanced for the Winter Education Institute. The Committee's Sarbanes-Oxley program, however, will be given later in the year at the joint meeting with the American Bar Association.

B. Guide to Organizing California Corporations. Teri Erickson reported that the Guide to Organizing California Corporations ("Guide") is scheduled for completion by June of 2003. Ms. Erickson informed the Committee that the working group is adding a section relating to dissolution. Ms. Erickson also reported that the Guide will be a practical resource for general practitioners and stated that Todd Vlaanderen from the Office of the California Secretary of State has volunteered to review applicable sections.

C. Blue Sky Guide. Keith Bishop reported that completion of the Blue Sky Guide is imminent.

D. Director Duties to Creditors. Dan Weiser stated that a legislative proposal regarding the

duties of directors to creditors under the California Corporations Code will be distributed for discussion at the next meeting of the Committee.

VII. NEW BUSINESS

A. SEC Comment Letter (Section 307 of Sarbanes-Oxley). Jim Fotenos provided an introduction to Section 307 of the Sarbanes-Oxley Act and the related Proposed Rules that were posted to the SEC website on November 25, 2002. Steve Hazen provided an overview of a draft comment letter ("Comment Letter") prepared by the drafting committee comprised of Keith Bishop, Bruce Dravis, Jim Fotenos and Steve Hazen ("Drafting Committee"), and distributed to the members of the Committee in advance of the meeting. Mr. Hazen summarized the objectives of the Comment Letter and reminded the Committee that the due date for submission to the SEC is December 18, 2002.

The Committee expressed several concerns relating to the Proposed Rules, including: (i) the conflict between the Proposed Rules and established California law regarding client confidentiality, (ii) the overbroad definition of "appearing and practicing before the Commission," (iii) the questionable attempt by the Proposed Rules to override state laws regarding privilege and admissibility of evidence, (iv) the imposition of documentation requirements on attorneys, (v) the attempted expansion of the identity of the corporate client to include shareholders of the issuer in direct conflict with established California law and rules of professional conduct, (vi) the substantial uncertainties raised by the Proposed Rules, and (vii) the negative consequences that are likely to result from the Proposed Rules, including the impairment of the effective assistance of counsel and negative impact on investor confidence.

A long and detailed discussion concerning the form of the Comment Letter followed. The primary issue was whether the Comment Letter should attempt to address all issues raised by the Proposed Rules or focus primarily on matters pertaining to California law, particularly in light of the short amount of time to respond. It was noted that several leading authorities from throughout the U.S. are expected to comment on the Proposed Rules. After a lengthy discussion, the Committee decided that the Comment Letter would have more impact if it focused primarily on matters pertaining to California law and the Drafting Committee was authorized to finalize the Comment Letter on that basis and submit it to the Legislative Committee and the Executive Committee of the Business Law Section the following week. The Committee unanimously expressed its appreciation for the impressive work performed by the Drafting Committee in the very short period of time.

B. Attorney General Enforcement of Securities Laws. Keith Bishop provided a general overview of the securities law enforcement system currently in place in California. The possible increased authority of the California Attorney General was then discussed.

C. Practice Issues. The Committee discussed a couple of practice issues raised by the members, including a recent experience involving an issue with supermajority voting rights under California Corporations Code Section 403(a) in connection with a filing with the California Secretary of State.

The meeting was adjourned at approximately 12:30 p.m.

James K. Dyer, Jr.

Corporation Committee Meeting Minutes

